2001

Namvar Taghipour and Danesh Rahemi, M.D., individuals and Jerez, Taghipour and Associations, LLC, a Utah limited liability company. v. Edgar C. Jerez, and individual, and Mount Olympus Financial, L.C., a Utah limited liability company. Dean Becker : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

NAMVAR TAGHIPOUR, and DANESH RAHEMI, M.D., individuals and JEREZ, TAGHIPOUR AND ASSOCIATIONS, LLC, a Utah limited liability company. Plaintiff and Appellants.	:	Case No. 20010450-SC
v.	:	
EDGAR C. JEREZ, an individual, and MOUNT OLYMPUS FINANCIAL, L.C., a Utah limited liability company. DEAN BECKER, Defendants and Appellees.	:	

BRIEF OF APPELLANT

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JURISDICTION OF THE COURT

The Utah Supreme Court granted certiorari on August 14, 2001, and has jurisdiction over this case pursuant to §78-2-2, U.C.A.

STATEMENT OF THE ISSUES

Was the Trial Court's decision dismissing the Appellants' Complaint for failure to state a claim for relief correct? Specifically, was Mt. Olympus completely insulated by §48-2b-127(2), U.C.A., from any due diligence requirements, under either tort or statutory law theories, to check out the legitimacy of the execution of a mortgage by the manager of a limited liability company who was specifically prohibited from making such a mortgage by the Operating Agreement of the limited liability company? This issue involves a

question of statutory interpretation, for which the standard of review is correctness. *Bearden v. Croft*, 2001 UT 76, ¶5, 31 P.3d 537, 538 (Utah 2001).

DETERMINATIVE STATUTORY PROVISIONS

The following statutes are determinative of the issues on appeal.

§48-2b-125, U.C.A.:

> (1)(b) If the management of the limited liability company is vested in the members, any member has authority to bind the limited liability company, unless otherwise provided in the articles of organization or operating agreement.
> (2)(b) If the management of the limited liability company is vested in a manager or managers, any manager has authority to bind the limited liability company, unless otherwise provided in the articles of organization or operating agreement.

§48-2b-127, U.C.A.:

> (2) Instruments and documents providing for the acquisition, mortgage or disposition of property of the limited liability company shall be valid and binding upon the limited liability company if they are executed by one or more managers of a limited liability company having a manager or managers or if they are executed by one or more members of a limited liability company in which management has been retained by the members.

The provisions of Sections 125 and 127 were repealed as of May 1, 2001. The new provisions on the same subject (which provide the protections being sought by Appellants through this action) are found in Section 48-2c-802, U.C.A:

Agency authority of members and managers.

* * *

(2) Except as provided in Subsection (3), in a manager-managed company:

(a) each manager is an agent of the company for the purpose of its business;

(b) a member is not an agent of the company for the purpose of its business solely by reason of being a member;

(c) an act of a manager, including the signing of a document in the company name, for apparently carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company unless the manager had no authority to act for the company in the particular matter and the lack of authority was expressly described in the articles of organization or the person with whom the manager was dealing knew or otherwise had notice that the manager lacked authority; and

(d) an act of a manager which is not apparently for carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company only if the act was authorized by the members in accordance with Subsection 48-2c-803(2) or (3).

(3) Notwithstanding the provisions of Subsections (1) and (2), unless the articles of organization expressly limit their authority, any member in a member-managed company, or any manager in a manager-managed company, may sign, acknowledge, and deliver any document transferring or affecting the company's interest in real or personal property, and if the authority is not so limited, the document shall be conclusive in favor of a person who gives value without knowledge of the lack of authority of the person who signs and delivers the document.

STATEMENT OF THE CASE

Appellants are some of the individuals who formed a limited liability company ("the LC") and the LC itself[1]. The purpose of the LC was to purchase and develop a parcel of real estate under a joint venture agreement. The Articles of Organization of the LC listed Defendant Edgar Jerez as the manager of the LC.

The Operating Agreement of the LC provided that no loan could be contracted on behalf of the LC without a resolution by the members. (See Appendix C.) Without obtaining the required approval and without the knowledge or consent of the other members of the LC, Jerez entered into a loan agreement on behalf of the LC with Appellee, Mt. Olympus. Jerez gave Mt. Olympus a Deed of Trust to the LC's property to secure a Trust Deed Note for $25,000.00. Other than apparently verifying that Jerez was the manager of the LC, Mt. Olympus did absolutely no due diligence of any kind to determine the propriety of Jerez's actions on behalf of the LC.

Mt. Olympus disbursed to Jerez only $20,000.00 of the loan keeping $5,000 as an origination fee, points or some other financing inducement. Jerez pocketed the loan money for himself and then defaulted on the loan by failing to make any payments. The other members of the LC, including Appellants, never received any notices of the default or of the pending foreclosure sale –

the notices went to Jerez. Appellants even continued to make payments on the promissory note to the underlying landowners of the property.

Mt. Olympus foreclosed on the property. Even after the Mt. Olympus foreclosure, the Appellants made a payment on a promissory note to the underlying landowner of the property because they did not know of the foreclosure. Only after the redemption period for the foreclosure sale had expired did the Appellants learn that the property had been mortgaged by Jerez to obtain the loan.

The Appellants filed an action in the Third District Court (R. 1-8), Appellees moved to dismiss (R. 15-19). The Trial Court granted the Motion (R. 59-61). A copy of the District Court's Memorandum Decision is attached as Appendix B. Appellants appealed the dismissal (R. 63-64). The Court of Appeals held that §48-2b-127(2) completely insulated Mt. Olympus from any due diligence requirements, under either tort or statutory law theories, to check out the legitimacy of the execution of a mortgage by the manager of a limited liability company who, in fact, was prohibited from making such a mortgage by the operating agreement. *Taghipour v Jerez*, 2001 UT App 139, ¶17, 26 P.3d 885, 888 (Utah Ct. App. 2001).

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[1] All of these facts are found in the Appellant's Complaint (R. 1-8) and must be

SUMMARY OF THE ARGUMENT

Prior to the 2001 Legislative session, the Utah Limited Liability Company Act contained a conflict between two statutory sections regarding the authority of a manager of a limited liability company to bind the company if the articles of incorporation or operating agreement directed otherwise. One statutory section limited the ability of a manager to the authority stated in the articles of organization or operating agreement. The other section allowed any member or manager to bind a limited liability company for property transactions. This Court should construe the two sections of the Act in harmony and hold that the signature of the manger alone is insufficient to bind a limited liability company when the operating agreement of the company does not grant such powers to the manager. This Court should also recognize a common law duty requiring a party in a commercial loan setting to conduct at least minimal due diligence to determine the corporate authority of a manager or member under the articles of incorporation and/or the operating agreement.

ARGUMENT

POINT I

A PARTY IN A COMMERCIAL LOAN SETTING HAS A DUE DILIGENCE REQUIREMENT TO DETERMINE THE CORPORATE AUTHORITY OF A MANAGER TO ENCUMBER THE ASSETS OF THE CORPORATION.

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taken as true.

Whether a lending institution, prior to the statutory codification of their duty by the Legislature in 2001, had a common law duty to verify that a manager of a limited liability company has the authority to bind the company is a case of first impression in Utah and, apparently, the United States. In looking at other types of Utah business entities it is clear that a person acting on behalf of the entity must have authority to do so. The same principle should apply to limited liability companies.

In a case determining whether the law firm of a corporation was an agent of the corporation, the Court of Appeals stated that "[f]or example, no officer or agent of a corporation has authority to bind the firm in a real estate deal without a board resolution." *Western Fiberglass v. Kirton, McKonkie and Bushnell*, 789 P.2d 34, 38, footnote 6 (Utah Ct. App. 1990).

Under Utah partnership law, where a general partner secured loans through a trust deed on a piece of property that the partnership owned without the knowledge of the limited partners, this Court held:

> Any person dealing with a partner can only rely on the partner's acts if they are within the ordinary and apparent scope of the partnership business. The burden of proof as to the partner's authority is on the party seeking to enforce the transaction.

Luddington v. Bodenvest, Ltd. 855 P.2d 204, 207 (Utah 1993). (Citations omitted.)

If lenders dealing with corporate and partnership entities in Utah already are required to verify that an agent have actual or apparent authority to bind the entity, then requiring the same for the limited liability company entity is not an undue burden on a lender. "Common law concepts of agency apply with respect to LLC's to the same extent and in the same manner in which those principles apply with respect to any other legal person." Nicholas G. Karambelas, Limited Liability Companies, §5:07 (April 1999). When the potential for damage is so great, it is not an undue burden to require that finance companies exercise some rudimentary due diligence to determine the signature authority of the borrower.

POINT II

THE STATUTES IN EFFECT AT THE TIME OF THIS PROCEEDING WERE IN CONFLICT, AND SHOULD HAVE BEEN READ TO ACHIEVE A HARMONIOUS RESULT.

The two statutes that were in effect at the time of this proceeding were in conflict. A manager's ability to "bind the limited liability company" is restricted if "otherwise provided in the articles of organization or operating agreement" pursuant to§48-2b-125(2)(b), U.C.A. But §48-2b-127(2), U.C.A., pertaining only to documents providing for the mortgage of property, indicated that the documents "shall be valid and binding upon the limited liability company if they are executed by one or more managers."

A. The statutes should be read in harmony.

The two statutes can and should be read in harmony with each other to prevent unjust results.

> Equally important as relying on the statute's plain language is the rule "that a statute should be construed as a whole, with all of its provisions construed to be harmonious with each other and with the overall legislative objective of the statute."

Hebertson v. Bank One, Utah, 1999 Utah App. 342, ¶17, footnote 7, 995 P.2d 7, 12 (Utah Ct. App. 1999), *citing, Nixon v. Salt Lake City Corp.*, 898 P.2d 265, 268 (Utah 1995).

Such a harmonious reading here would require that a manager be properly authorized to bind the limited liability company in all situations, including signing for a mortgage or any other documents that may affect a property interest of the limited liability company.

B. A statute with a more restrictive result should be read as the more specific provision.

The Court of Appeals focused on the rule of statutory construction that a more specific statutory provision always takes precedence over a more general statutory provision. In doing so, the Court of Appeals ruled that the "specific requirements of section 48-2b-127(2) must control over the general application of section 48-2b-125(2)(b)'s restrictions." *Jerez, supra* at 888. Their reasoning was that the provision of §48-2b-127(2), U.C.A., applying to documents affecting the property interest of a limited liability company was

more specific than § 48-2b-127(2), U.C.A., restricting the rights of the manager to bind the limited liability company unless otherwise provided in the articles of organization or operating agreement. This Court should hold, instead, that the more specific clause is the more restrictive clause, which would require authority in all situations.

In a case where there was a similar conflict between two statutes, one statute stated that the Utah Administrative Procedure Act (UAPA) did not apply to state actions regarding the purchase or sale of real property, and another statute stated that the UAPA applied to any agency action of the Board and Division of State Lands, this Court found that the more specific clause was the one that applied the UAPA to any agency action of the Board and Division of State Lands. *Southern Utah Wilderness Alliance*, 830 P.2d 233, 235 (Utah 1992). No reasoning was given stating why that clause was considered the more specific. However, in looking at the two clauses, it is apparent that the clause applying the Utah Administrative Procedure Act to any State Lands agency action was more restrictive and therefore more limiting.

The same result should apply in this case. Just as *Southern Utah Wilderness Alliance* found that the more specific clause was the one that applied to any actions of the Board, this Court should find that the more specific clause is the one that applies to any actions of the manager of the limited liability company.

C. Legislative History also shows that the legislature intended the more restrictive result.

In addition, legislative history shows that the legislature intended a more restrictive result, and wanted the authority of managers to be verified before binding the company in important decisions. When the Legislature first enacted the Utah Limited Liability Company Act in 1991, it allowed any manager to "have the authority to bind the limited liability company," without any restrictions about being authorized by the articles of incorporation or operating agreement. 1991 Laws of Utah 998.

In 1992, the Legislature restricted the authority of the manager under §48-2b-125 by allowing them to bind the company "unless otherwise provided in the articles of organization." 1992 Laws of Utah 655, Sec. 8. In 1996, the authority of the manager was further restricted when the act was again amended to include "or operating agreement." 1996 Laws of Utah 577. This history shows the Legislature specifically added the section later limiting the power of the manager to allow them only to bind a company in situations where they were properly authorized.

Further, the Legislature in 2001 recently rewrote the sections expressly limiting the power of the manager to only bind the company, even in real property situations, only if they are allowed to do so by the Articles of Incorporation. 2001 Laws of Utah Ch. 260, §62 *codified* as §48-2c-802, U.C.A.

Statutory construction principles state that:

> It is established practice in American legal processes to consider relevant information concerning the historical background of enactment in making decisions about how a statute is to be constructed and applied. This would be especially true when there is no case law directly on point, or the statutory language is inadequate or unclear.

2A Norman J. Singer, Statutes and Statutory Construction §48.03 (2000).

As this is a case of first impression and the two provisions of the prior statute conflict, the intent of the Legislature manifested by the legislative history should be taken into consideration. The restrictions inserted throughout the years by the Legislature should be given weight in determining their intent. The documents listed in §48-2b-127 (e.g., mortgages) as binding on a limited liability company have the greatest potential for damage to a limited liability company because they are encumbering the property of the limited liability company. Therefore, these are the documents where it is imperative that the person signing the document be authorized to do so. Thus, in the event of a conflict between §48-2b-127, arguably binding the limited liability company to the wrongfully executed documents, and §48-2b-125, protecting the limited liability company from the unauthorized actions of its members, the intent of the Legislature to protect the limited liability company has now been established conclusively by the amendments to the Limited Liability Company Act enacted in 2001.

CONCLUSION

This Court should hold that, as with other business entities, there is a common law duty of due diligence requiring lending institutions to conduct at least minimal due diligence to determine the corporate authority of a manager or member under the Articles of Incorporation or Operating Agreement. This Court should read the two conflicting statutes in harmony, uphold the intent of the Legislature and give effect to the most restrictive statutory provision by limiting the power of a manager to bind a limited liability company if properly authorized to do so. This Court should therefore reverse the Court of Appeals decision and the District Court's dismissal of this action and remand the matter to the District Court for further proceedings.

Respectfully submitted this 31ST day of October, 2001.

BRUCE R. BAIRD
Attorney for Plaintiffs/Appellants

MAILING CERTIFICATE

I hereby certify that on this 31st day of October, 2001, I served two copies of the attached BRIEF OF APPELLANT upon the following counsel for Appellee and other parties, by mailing it to them by first class mail with sufficient postage prepaid to the following address:

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EXHIBIT A

IN THE UTAH COURT OF APPEALS

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Namvar Taghipour and Danesh Rahemi, M.D., individuals; and Jerez, Taghipour, and Associates, LLC, a Utah limited liability company, Plaintiffs and Appellants, v. Edgar C. Jerez, an individual; and Mount Olympus Financial, L.C., a Utah limited liability company, Defendants and Appellees.	OPINION (For Official Publication) Case No. 20000047-CA F I L E D (April 26, 2001) 2001 UT App 139

Third District, Salt Lake Department
The Honorable Anne M. Stirba

Attorneys: Bruce R. Baird and Dean H. Becker, Salt Lake City, for Appellants
Blake S. Atkin and Jonathan Hawkins, Salt Lake City, for Appellees

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Before Judges Billings, Orme, and Thorne.

THORNE, Judge:

¶1 Plaintiffs Namvar Taghipour, Danesh Rahemi, M.D., and Jerez, Taghipour and Associates, LLC, appeal from an order dismissing their claims against defendant Mt. Olympus Financial, L.C. (Mt. Olympus). We affirm.

BACKGROUND

¶2 On August 30, 1994, Taghipour, Rahemi, and co-defendant Edgar Jerez (Jerez) formed Jerez, Taghipour and Associates, LLC (the LLC). The group formed the LLC to purchase and develop a parcel of real estate (the Property) under a joint venture agreement. The LLC's Articles of Organization listed Jerez as a

LLC member and a manager, while its Operating Agreement provided that no loan could be contracted on behalf of the LLC without a resolution approved by its members.

¶3 On August 31, 1994, the LLC acquired the Property. On January 10, 1997, Jerez, unbeknownst to the LLC's other members or managers, unilaterally entered into a loan agreement for $25,000 with Mt. Olympus on behalf of the LLC. To secure the loan, Jerez executed and delivered a trust deed on the Property to Mt. Olympus. Subsequently, Mt. Olympus dispersed $20,000 of the funds to Jerez and kept the remaining $5,000 for various fees. Jerez apparently misappropriated the $20,000. The LLC, unaware of the loan, ultimately defaulted on it and Mt. Olympus foreclosed on the Property.

¶4 On June 18, 1999, plaintiffs sued Mt. Olympus and Jerez, asserting claims against Mt. Olympus for: (1) declaratory judgment, (2) negligence, and (3) partition. In response, Mt. Olympus filed a motion to dismiss. The trial court granted Mt. Olympus's motion, ruling that pursuant to Utah Code Ann. § 48-2b-127(2) (1998), the documents executed by Jerez were binding upon the LLC. Plaintiffs timely appealed.

ISSUES AND STANDARDS OF REVIEW

¶5 "The propriety of a dismissal based on Utah R. Civ. P. 12(b)(6) is a question of law; therefore we review the [trial] court's ruling for correctness." Stokes v. Van Wagoner, 1999 UT 94,¶6, 987 P.2d 602.

¶6 Plaintiffs argue the trial court's interpretation of section 48-2b-127(2) was in error, because a manager cannot unilaterally bind a limited liability company when the company's operating agreement or articles of organization require a majority vote or a resolution before undertaking such an act. We review questions of statutory interpretation for correctness, according no deference to the trial court's conclusions. See Adkins v. Uncle Bart's, Inc., 2000 UT 14,¶11, 1 P.3d 528.

¶7 Plaintiffs next argue the trial court erred by ruling, as a matter of law, that Mt. Olympus had taken the steps necessary to determine Jerez was a LLC manager. We review a trial court's rulings of law for correctness. See Munford v. Lee Servicing Co., 2000 UT App 108,¶10, 999 P.2d 23.

¶8 Finally, plaintiffs argue the trial court erred by dismissing their partition claim against Mt. Olympus. This also presents a question of law, which we review for correctness. See id.

ANALYSIS

A. Statutory Interpretation of Utah Code Ann. § 48-2b-127

¶9 Plaintiffs argue the Mt. Olympus loan agreement, unilaterally executed by Jerez on behalf of the LLC, is invalid because the LLC's Operating Agreement requires membership approval before such an undertaking. Plaintiffs assert that section 48-2b-127(2), a Utah Limited Liability Act provision, requires such a result.

¶10 The rules of statutory construction require that we look "first to the plain language of a statute . . . and assume[] that each term was used advisedly by the [L]egislature." Biddle v. Washington Terrace City, 1999 UT 110,¶14, 993 P.2d 875. Further, "it is well settled that a more specific [statutory] provision always takes precedence over a more general [statutory] provision." State v. Hinson, 966 P.2d 273, 277 (Utah Ct. App. 1998); see also Southern Utah Wilderness Alliance v. Board of State Lands & Forestry, 830 P.2d 233, 235 (Utah 1992).

¶11 In the present matter, plaintiffs argue that Utah Code Ann. § 48-2b-125(2)(b) (1998) and Utah Code Ann. § 48-2b-127(2) (1998) should be read in harmony, and therefore, section 48-2b-125(2)(b)'s restrictions on manager authority should be incorporated into section 48-2b-127(2). In pertinent part, section 48-2b-125(2)(b) states: "If the management of the limited liability company is vested in a manager or managers, any manager has authority to bind the limited liability company, unless otherwise provided in the articles of organization or operating agreement." Utah Code Ann. § 48-2b-125(2)(b) (1998) (emphasis added). In contrast, section 48-2b-127(2) states: "Instruments and documents providing for the acquisition, mortgage, or disposition of property of the limited liability company shall be valid and binding upon the limited liability company if they are executed by one or more managers." Id. § 48-2b-127(2).

¶12 The plain language of section 48-2b-127(2) provides no limitations on a manager's authority to execute specified instruments and documents, and thus, bind the limited liability company. Further, assuming, as we must, that "each term [in section 48-2b-127(2)] was used advisedly by the [L]egislature," Biddle, 1999 UT 110 at ¶14, we find no reason to suggest that had the Legislature intended section 48-2b-127(2) to include the same restrictions set forth in section 48-2b-125(2)(b), the Legislature would have omitted those restrictions.

¶13 Additionally, plaintiffs' argument ignores the well-established rule of construction that specific statutory provisions prevail over general statutory provisions. See

, 966 P.2d at 277. Section 48-2b-127(2) states, ain terms, "[i]nstruments and documents . . . shall and binding upon the limited liability company ed by one or more managers." Utah Code Ann. § (emphasis added). Accordingly, the specific ction 48-2b-127(2) must control over the general ction 48-2b-125(2)(b)'s restrictions.

Finally, we acknowledge plaintiffs' concern that ents listed in [section] 48-2b-127 have the great tial for damage to a limited liability company by ncumbering the property of the limited liability rer, "[i]t is the power and responsibility of the gislature to enact laws to promote the public he ls, and general welfare of society . . . and [we] titute our judgment for that of the [L]egislature ect to what best serves the public interest." Bu , 661 P.2d 953, 956 (Utah 1983); see also Redwood County Comm'n, 624 P.2d 1138, 1141 (Utah 1981) is not the function of [appellate] court[s] to e lom or practical necessity of legislative enactm Mason, 94 Utah 501, 509, 78 P.2d 920, 923 (1938) judiciary "cannot supplant [the Legislature's] own).

Furthermore, we can conceive of several reason islature might choose not to expand the protecti ckholders of a limited liability company in tra olving the mortgage of real property. These re lude the need to facilitate transactions involv nsfer of title to property and mortgages from t ties to new parties, and the limited access the ve to organic documents not revealed in a title

6 It is not necessary for our purpose, however, entify a specific basis for the Legislature's de ther, all that is required is that we acknowledg gislature's right to exercise its judgment. It evaluate, as plaintiffs would have us do, the gislature's choice in light of alternative cours cordingly, we find no error in the trial court' section 48-2b-127(2).

B. Requirements of Utah Code Ann. § 48-2b-

17 Plaintiffs next argue the trial court erred atter of law, that Mt. Olympus had taken the step letermine Jerez was a LLC manager. Plaintiffs co greement was "invalid because [Mt.] Olympus fail hat Jerez . . . did not have the power to take

did under the [LLC's] Articles [of Organization] and Operating Agreement." Mt. Olympus, however, correctly concluded that Jerez was a manager of the LLC, and section 48-2b-127(2) requires nothing more. Accordingly, the trial court correctly determined that Mt. Olympus took the steps necessary to determine Jerez was a manager of the LLC, and therefore, satisfied the requirements of section 48-2b-127(2).

C. Partition

¶18 Finally, plaintiffs argue the trial court erred by dismissing their claim for partition. After reviewing the trial memoranda of both parties, the trial court found section 48-2b-127(2) dispositive and dismissed plaintiffs' claims.[1] Following dismissal, the record in this matter lacks an objection or any other attempt by plaintiffs to obtain a specific ruling on their partition claim. "As a general rule, claims not raised before the trial court may not be raised on appeal." State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346. In addition, we note that plaintiffs' failure to establish that Jerez lacked the authority to bind the LLC also results in the failure of their partition claim. We therefore decline to reach the merits of plaintiffs' partition claim.

¶19 The judgment of the trial court is affirmed.

William A. Thorne, Jr., Judge

¶20 I CONCUR:

Judith M. Billings, Judge

ORME, Judge (concurring):

¶21 I concur in the court's opinion. In so doing, I must note that I find the policy reflected in sections 48-2b-125(2)(b) and -127(2) to be quite curious. If, as in this case, there are

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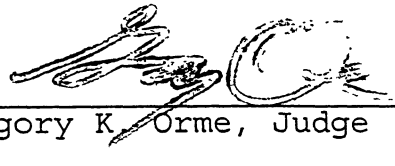
1. The trial court ruled that "[t]he [Mt. Olympus loan] documents executed by Mr. Jerez are valid and binding on the [LLC]."

restrictions in a limited liability company's organic documents on its managers' ability to unilaterally bind the company, those restrictions will be effective across the range of mundane and comparatively insignificant contracts purportedly entered into by the company, but the restrictions will be ineffective in the case of the company's most important contracts. Thus, if the articles of organization or operating agreement provide that the managers will enter into no contract without the approval of the company's members, as memorialized in an appropriate resolution, the company can escape an unauthorized contract for janitorial services, coffee supplies, or photocopying, but is stuck with the sale of its property for less than fair value or a loan on unfavorable terms.

¶22 Surely this is at odds with the expectations of the business community. A manager or officer typically can bind the company to comparatively unimportant contracts, but, as is provided in the Operating Agreement in this case, needs member or board approval to borrow against company assets. Financial institutions know this and are able to protect themselves by insisting on seeing articles of incorporation, bylaws, and board resolutions--or the limited liability company equivalents--as part of the mortgage loan process. A cursory review of such documents in this case would have disclosed that Jerez lacked the authority to bind the company to the proposed loan agreement.

¶23 In short, I suspect that the strange result in this case is not so much the product of carefully weighed policy considerations as it is the product of a legislative oversight or lapse of some kind. That being said, I readily agree that the language of both statutory sections is clear and unambiguous and that it is not the prerogative of the courts to rewrite legislation. If the laws which dictate the result in this case need to be fixed, the repairs must come via legislative amendment rather than judicial pronouncement.



Gregory K. Orme, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of April, 2001, a true and correct copy of the attached OPINION was deposited in the United States mail to:

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and a true and correct copy of the attached OPINION was placed in Interdepartmental Mailing to be delivered to the judge listed below:

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TRIAL COURT: THIRD DISTRICT, SALT LAKE, 990906383
APPEALS CASE NO.: 20000047-CA

48-2c-802. Agency authority of members and managers.

(1) Except as provided in Subsection (3), in a member-managed company:

(a) each member is an agent of the company for the purpose of its business;

(b) an act of a member, including the signing of a document in the company name, for apparently carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company, unless the member had no authority to act for the company in the particular matter and the lack of authority was expressly described in the articles of organization or the person with whom the member was dealing knew or otherwise had notice that the member lacked authority; and

(c) an act of a member which is not apparently for carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company only if the act was authorized by the other members in accordance with Section 48-2c-803.

(2) Except as provided in Subsection (3), in a manager-managed company:

(a) each manager is an agent of the company for the purpose of its business;

(b) a member is not an agent of the company for the purpose of its business solely by reason of being a member;

(c) an act of a manager, including the signing of a document in the company name, for apparently carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company unless the manager had no authority to act for the company in the particular matter and the lack of authority was expressly described in the articles of organization or the person with whom the manager was dealing knew or otherwise had notice that the manager lacked authority; and

(d) an act of a manager which is not apparently for carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company only if the act was authorized by the members in accordance with Subsection 48-2c-803(2) or (3).

(3) Notwithstanding the provisions of Subsections (1) and (2), unless the articles of organization expressly limit their authority, any member in a member-managed company, or any manager in a manager-managed company, may sign, acknowledge, and deliver any document transferring or affecting the company's interest in real or personal property, and if the authority is not so limited, the document shall be conclusive in favor of a person who gives value without knowledge of the lack of authority of the person who signs and delivers the document.

Enacted by Chapter 260, 2001 General Session

EXHIBIT B

Blake S. Atkin #4466
ATKIN & LILJA, P.C.
136 South Main, Suite 810
Salt Lake City, Utah 84101
Telephone: (801) 533-0300

Attorneys for Defendant
Mount Olympus Financial, L.C.

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

NAMVAR TAGHIPOUR and DANESH RAHEMI, M.D., individuals, and JEREZ TAGHIPOUR AND ASSOCIATES, LLC, a Utah limited liability company, Plaintiffs, v. EDGAR C. JEREZ, an individual, and MOUNT OLYMPUS FINANCIAL, L.C., a Utah limited liability company, Defendants.	ORDER DISMISSING ALL CLAIMS AGAINST DEFENDANT MOUNT OLYMPUS FINANCIAL, LLC Civil No. 990906383 Hon. Anne M. Stirba

This matter came on regularly for hearing on the Motion to Dismiss of Defendant Mt Olympus Financial, LLC on December 2, 1999. Plaintiff was represented by Bruce R. Baird and Defendant was represented by Blake S. Atkin. The Court having considered the memoranda filed by the parties, and having heard the argument of counsel, rules as follows:

Utah Code Annotated § 48-2b-127 states that instruments and documents providing for the mortgage of property of a limited liability company are valid and binding on the limited liability company if they are executed by the manager.

The Complaint in this matter alleges that Edgar Jerez, who executed the documents in this case, was the manager of the L.C.

THE COURT THEREFORE FINDS, as a matter of law, that Mt Olympus Financial performed all the due diligence necessary. The documents executed by Mr. Jerez are valid and binding on the L.C.

Since all of Plaintiffs' claims are based on the allegation that the documents are not valid and binding because Mt Olympus Financial owed additional duties of due diligence, all of Plaintiffs' claims fail as a matter of law.

Accordingly, all of Plaintiffs' claims against Mt Olympus Financial are dismissed with prejudice.

THE COURT ALSO FINDS that there is no just reason for delay and expressly directs the entry of final judgment on Plaintiffs' claims against Mt Olympus Financial.

DATED this 15th day of December, 1999.

BY THE COURT:

ANNE M. STIRBA
Third District Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

APPROVED AS TO FORM:

BAIRD & JONES

BRUCE R. BAIRD
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing ORDER DISMISSING ALL CLAIMS AGAINST DEFENDANT MT OLYMPUS FINANCIAL, LLC was mailed, postage prepaid, this 13th day of December, 1999 to the following:

Bruce R. Baird
BAIRD & JONES, L.C.
201 South Main, Suite 900
Salt Lake City, Utah 84111

Cabrina Tobler

orddismi.jta

EXHIBIT C

LIMITED LIABILITY COMPANY OPERATING AGREEMENT

of

JEREZ, TAGHIPOUR and ASSOCIATES, LLC, a Utah Limited Liability Company

ARTICLE 1.
OFFICES

1.1 Principal Office. The principal office of the Company in the State of Utah will be located at 3664 East 7650 South, Salt Lake City, Utah 84121. The Company may have other offices, either within or without the state of Utah as the Members may designate or as the business of the Company may from time to time require.

1.2 Registered Office. The registered office of the Company, required by the Utah Limited Liability Company Act to be maintained in the State of Utah, may, but need not, be identical with the Principal Office in the State of Utah. The address of the initial registered office of the Company is 10 Exchange Place, Suite 309, Salt Lake City, Utah , and the initial registered agent at the address is Dean H. Becker. The registered office and the registered agent may be changed from time to time by action of the Members and by filing the prescribed form with the Utah Secretary of State.

ARTICLE II.
MEETINGS

2.1 Annual Meeting. The annual meeting of the Members will be held the first Tuesday in the month of January in each year, beginning with the year 1995 at the hour of 9:00 o'clock a.m., for the purpose of retaining or replacing an Operating Manager and for the transaction of other business as may come before the meeting. If the day fixed for the annual meeting is a legal holiday, the meeting will held on the next succeeding business day. If the election is not held on the day designated in this Agreement for the annual meeting of the Members, or at any adjournment of the meeting, the Members will cause the election to be held at a special meeting of the Members as soon afterward as it may conveniently be held.

2.2 Regular Meetings. The Members may prescribe the time and place for the holding of gular meetings and may provide that the adoption of the resolution will constitute notice of regular eetings. If the Members do not prescribe the time and place for the holding of regular meetings, gular meetings will be held at the time and place specified by the Operating Manager in the notice each regular meeting.

2.3 Special Meetings. Special meetings of the Members, for any purposes, unless otherwise escribed by statute, may be called by the Operating Manager or by any two Members.

2.4 Notice of Meeting. Written notice stating the place, day and hour of the meeting and, case of a special meeting, the purposes for which the meeting is called, must be delivered not less ıan three business days before the date of the meeting, either personally or by mail, by or at the irection of the Operating Manager, to each Member of record entitled to vote at the meeting. If ıailed, the notice will be deemed to be delivered two days after deposit in the United States Mail, ıddressed to the Member at his address as it appears on the books of the Company, with postage ırepaid. When all the Members of the Company are present at any meeting, or if those not present ;ign in writing a waiver of notice of the meeting, or subsequently ratify all the proceedings of the ıeeting, the transactions of the meeting are as valid as if a meeting were formally called and notice ıad been given.

2.5 Quorum. At any meeting of the Members, a majority of the equity interests, as determined from the capital contribution of each Member as reflected by the books of the Company, represented in person or by proxy, will constitute a quorum at a meeting of Members. If less than a majority of the equity interests are represented at a meeting, a majority of the interests so represented may adjourn the meeting from time to time without further notice. At an adjourned meeting at which a quorum is present or represented, any business may be transacted which might have been transacted at the meeting as originally notified. The Members present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of

enough Members to leave less than a quorum.

2.6 Proxies. At all meetings of Members, a Member may vote by proxy executed in writing by the Member or by his duly authorized attorney-in-fact. The proxy must be filed with the Operating Manager of the Company before or at the time of the meeting. No proxy shall be valid after three months from date of execution.

2.7 Voting by Certain Members. Management Certificates standing in the name of a corporation, partnership or company may be voted by an officer, partner, agent or proxy as the Bylaws of the entity prescribe or, in the absence of such provision, as the president or managing partner of the entity may determine. Certificates held by a trustee, personal representative, administrator, executor, guardian or conservator may be voted by such person, either in person or by proxy, without a transfer of the certificates into the person's name.

2.8 Manner of Acting:

2.8.1 Formal action by Members. The act of 51% of the ownership interests will be the act of the Members. Voting on a particular issue may be in accordance with percentage of equity ownership in the company.

2.8.2 Procedure. The Operating Manager of the Company will preside at meetings of the Members, may move or second any item of business and may vote his ownership interest. The voting will be in accordance with the percentage of equity ownership in the company. A record must be maintained of the meetings of the Members. The Members may adopt their own rules of procedure which may not be inconsistent with this Operating Agreement.

2.8.3 Presumption of Assent. A Member of the Company who is present at a meeting of the Members at which action on any matter is taken will be presumed to have assented to the action taken, unless the Member's dissent is entered in the minutes of the meeting or unless the Member files a written dissent to the action with the person acting as the secretary of the meeting before the adjournment of the meeting or forwards the notice of dissent by certified mail to the secretary of the

neeting immediately after the adjournment of the meeting. The right to dissent will not apply to a Member who voted in favor of the action.

2.8 4 Informal Action of Members. Unless otherwise provided by law, any action required o be taken at a meeting of the Members, or any other action which may be taken at a meeting of he Members, may be taken without a meeting if a consent is in writing, setting forth the action so aken and is signed by all the Members entitled to vote with respect to the subject matter of the neeting..

2.9 Order of Business. The order of business at all meetings of the Members will be as follows:

1. Roll Call.
2. Proof of notice of meeting or waiver of notice.
3. Reading of minutes of preceding meeting.
4. Report of the Operating Manager.
5. Reports of Committees.
6. Unfinished Business.
7. New Business.

2.9 Telephonic Meeting. Members of the Company may participate in any meeting of the Members by means of conference telephone or similar communication if all persons participating in a meeting can hear one another for the entire discussion of the matters. Participating in a meeting pursuant to this Section will constitute presence in person at the meeting.

ARTICLE III
FISCAL MATTERS

3.1 Fiscal Year. The fiscal year of the Limited Liability Company will begin on the first day of January and end on the last day of December each year, unless otherwise determined by resolution of the Members.

3.2 Deposits. All funds of the Limited Liability Company will be deposited from time to time to the credit of the Limited Liability Company in the banks, trust companies or other depositories as the Members select.

3.3 Checks, Drafts, Etc. All checks drafts or other orders for the payment of money, and all

notes or other evidences of indebtedness issued in the name of the Company will be signed by the Operating Manager.

3.4 Loans. No loans may be contracted on behalf of the Limited Liability Company or no evidences of indebtedness may be issued in its name unless authorized by a resolution of the Members. The authority may be general or confined to specific instances.

3.5 Contracts. The Members may authorize any Member or agent of the Company, in addition to the Operating Manager, to enter into any contract or execute any instrument in the name of and on behalf of the Company, and the authority may be general or confined to specific instances.

3.6 Accountant. An accountant may be selected from time to time by the Members to perform the tax and accounting services as required. The accountant may be removed by the Members without assigning any cause for removal.

3.7 Legal Counsel. One or more Attorneys at Law may be selected from time to time by the Members to review the legal affairs of the Company and to perform other services as may be required and to report to the Members with respect to those services. Legal Counsel may be removed by the Members without assigning any cause for removal.

ARTICLE IV.
OWNERSHIP CERTIFICATES AND THEIR TRANSFER

4.1 Certificates. Ownership Certificates representing equity interests in the Company shall be in a form determined by the Members. Certificates must be signed by the Operating Manager and one other Member as assigned by a vote of the Members. All Certificates must be consecutively numbered or otherwise identified. The name and address of the person to whom the Certificates are issued, along with the persons's capital contribution, shall be entered on the Certificate.

4.2 Certificate Register. Any and all changes in Members or their amount of capital contribution must be noted on the books of the company.

4.3 Transfers of Shares. Any Member proposing a transfer or assignment of his Certificate must first notify the Company, in writing, of all the details and consideration for the proposed transfer

assignment. The company, for the benefit of the remaining Members, shall have the first right to quire the equity by cancellation of the Certificate under the same terms and conditions presented the departing Member to the third party. The election to purchase such interest must be ercised by the Company within thirty days of the initial presentation of the offer.

If the company declines to elect the option to purchase the assets, the remaining Members ho desire to participate may proportionately (or in the proportions as the remaining Members may gree) purchase the interest under the same terms and conditions first proposed by the withdrawing lember.

If the transfer or assignment is made as originally proposed and the other Members fail to pprove the transfer or assignment by unanimous written consent, the transferee or assignee will ave no right to participate in the management of the business and affairs of the Limited Liability ompany or to become a Member. The transferee or assignee will only be entitled to receive the hare of the profit or other compensation by way of income and the return of contributions to which hat Member would otherwise be entitled.

ARTICLE V.
BOOKS AND RECORDS

5.1 Books and Records. The books and records of the company must be kept at the principal office of the company or at other places, within or without the state of Utah, as the Members rom time to time determine.

5.2 Right of Inspection. Any Member of record will have the right to examine and make copies, at any reasonable time or times for all purposes, the books and records of account, minutes and records of Members. The inspection may be made by any agent or attorney of the Member. On the written request of any Member, the Company must mail to such Member its most recent financial statements, showing in reasonable detail its assets and liabilities and the results of its operations.

5.3 Financial Records. All financial records will be maintained and reported based upon generally acceptable accounting practices.

ARTICLE VI.
DISTRIBUTION OF PROFITS

The Members may from time to time unanimously declare, and the company may distribute, accumulated profits agreed not necessary for the cash needs of the company's business. In the event that any Member believes that profits are being unnecessarily retained, the Member shall be entitled to call a special meeting for the sole purpose of determining the prudence of distributing the profits in a manner other than that directed by the Manager. The special meeting referred to in this Article shall not be controlled by the provisions of Section 2.3 above, for such special meeting may be called by any one member. All other provisions regarding voting and notice shall apply to this Article.

OFFICERS

7.1 Operating Manager. The Operating Manager will be the chief executive officer of the Company responsible for the general overall supervision of the business and affairs of the Company. When present, the manager will preside at all meetings of the Members. The Operating Manager may sign, on behalf of the Company, deeds, mortgages, bonds, contracts or other instruments which have been appropriately authorized to be executed by the Members except in cases where the signing or execution is expressly delegated by the Members or by this Operating agreement or by statute to some other Officer or Agent of the company; and, in general, shall perform all duties as may be prescribed by the Board from time to time.

The specific authority and responsibility of the Operating manager will also include the following:

1. The Operating Manager will effectuate this Operating Agreement and the Regulations and decisions of the Members.

2. The Operating Manager will direct and supervise the operations of the Company.
3. The Operating Manager, within parameters as may be set by the Members, will establish charges for services and products of the Limited liability Company as may be necessary to provide adequate income for the efficient operation of the Company.
4. The Operating Manager, within the budget established by the Members, will set and adjust wages and rates of pay for all personnel of the Company and will appoint, hire and dismiss all personnel and regulate their hours of work.
5. The Operating Manager will keep the Members advised in all matters pertaining to the operation of the Company, services rendered, operating income and expense, financial position, and, to this end, will prepare and submit a report to the Members at each regular meeting and at other times as may be directed by the Members.

7.2 Other Officers. The Company, at the discretion of the Members, may have additional Officers including, without limitation, one or more Vice-Operating Managers, one or more Secretaries and one or more Treasurers. Officers need not be selected from among the Members. One person may hold two or more offices, except one person may not hold both the office of Operating Manager and the office of Secretary. When the incumbent of an office, as determined by the incumbent himself or by the Members, is unable to perform the duties of his office, or when there is no incumbent of an office (both such situations referred to below as the "absence" of the Officer), the duties of the office shall be performed by the person specified by the Members.

7.3 Election and Tenure. The Officers of the Company will be elected annually by the Members at the annual meeting. Each Officer will hold office from the date of his election until the next annual meeting and until his successor has been elected, unless the officer sooner resigns or is removed.

7.4 Resignations and Removal. Any Officer may resign at any time by giving written notice to the Operating Manager or to all of the Members and, unless otherwise specified, the acceptance of the resignation will not be necessary to make it effective. Any Officer may be removed at any time by the Members with or without cause unless removal without cause violates state or federal law regarding the termination of employment or is solely based upon the officer's race, gender, religion or age

7.5 Vacancies. A vacancy in any office may be filled for the unexpired portion of the term by

the Members.

7.6 Salaries. The salaries of the officers will be fixed from time to time by the Members and no officer may be prevented from receiving such salary by reason of the fact that he is also a Member of the Company.

ARTICLE VIII.
MISCELLANEOUS

8.1 Notice. Any notice required or permitted to be given pursuant to the provisions of statute, the Articles of Organization of the Limited Lability Company, this Operating Agreement will be effective as of the date personally delivered or, if sent by mail, two days from the date deposited with the United States Postal Service, prepaid and addressed to the intended receiver at the receiver's last known address as shown in the records of the Limited Liability Company.

8.2 Waiver of Notice. Whenever any notice is required to be given pursuant to the provisions of the Statute, the Articles of Organization of the Limited Liability Company or this Operating Agreement, a waiver of the notice, in writing, signed by the persons entitled to notice, whether before or after the time stated, will be deemed equivalent to the giving of the notice.

8.3 Indemnification by Company. The Limited Liability Company may indemnify any person who was or is a party defendant to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of the Limited Liability Company) by reason of the fact that such person is or was a Member of the Company, Officer, employee or agent of the Company, or is or was serving at the request of the Company, against expenses (including attorney's fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with the action, suit or proceeding if the Members determine that the person acted in good faith and in a manner reasonably believed to be in or not opposed to the best interest of the Limited Liability Company, and with respect to any criminal action or proceeding, has no reasonable cause to believe the conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement,

onviction, or on a plea of nolo contendere or its equivalent, will not in itself create a presumption at the person did or did not act in good faith and in a manner reasonably believed to be in the best terest of the Limited Liability Company.

8 4 Indemnification Funding. The Company will fund the indemnification obligations provided y Section 8.3 in the manner and to the extent the Members may from time to time deem proper.

8.5 Duality of Interest Transactions. Members of this Company have a duty of undivided yalty to this Company in all matters affecting this Company's interest.

8.6 Anticipated Transactions. Notwithstanding the provision of Section 8.5, it as anticipated iat the Members and Officers will have other legal and financial relationships. Representatives of iis Company, along with representatives of other entities, from time to time may participate in the oint development of contracts and transactions designed to be fair and reasonable to each iarticipant and to afford an aggregate benefit to all participants. Therefore, it is anticipated that this Company will desire the participation of the Company in these contracts and transactions may be authorized by the Members.

8.7 Gender and Number. Whenever the context requires, the gender of all words used in his Agreement will include the masculine, feminine and neuter, and the number of all words will nclude the singular and plural.

8.8 Articles and other Headings. The Articles and other headings contained in this Operating Agreement are for reference purposes only and will not affect the meaning or interpretation.

8.9 Reimbursement of Officers and Members. Officers and Members will receive reimbursement for expenses reasonable incurred in the performance of their duties.

8.10 Referral to Joint Venture Agreement. The terms and conditions of that certain Joint Venture Agreement signed on the ___ day of August, 1994 between Edgar C. Jerez, Namvar Taghipour, Orlando Jerez, Paul A. Bruno, Ksai Liang and Maretta Wrigley are adopted and incorporated into the terms of this Operating Agreement. In the event that there exists any conflict

between the terms of this Operating Agreement and the Joint Venture Agreement, the terms of this Operating Agreement control.

ARTICLE IX.
AMENDMENTS

9.0 Amendments. This Operating Agreement may be altered, amended, restated, or repealed and a new Operating Agreement may be adopted by three-fourths action of all ownership interests, after notice and opportunity for discussion of the proposed alteration, amendment, restatement, or repeal.

CERTIFICATION

THE UNDERSIGNED, being all of the Members of Jerez, Taghipour and Associates,, LLC a Utah Limited Liability Company, evidence their adoption and ratification of the foregoing Operating Agreement of the Company.

EXECUTED by each Member on the Date indicated.

_____	_____
EDGAR C. JEREZ	NAMVAR TAGHIPOUR
Date:_____	Date:_____
_____	_____
KSAI LIANG	MARETTA WRIGLEY
Date:_____	Date:_____
_____	_____
PAUL A. BRUNO	ORLANDO JEREZ
Date:_____	Date:_____

DEAN H. BECKER

Date: Aug 30, 1994

EXHIBIT D

CERTIFICATION OF LOAN PURPOSE

The undersigned, being the Borrowers pursuant to loan transaction dated 11/10/97 and in the amount of 25,500.00, and secured with property located at 3801 E. 6301 S. S.L.C., UT 84121 in Salt Lake County, State of Utah, with Mt Olympus Financial, LC, its successors and/or assigns, as Lender, hereby represent, warrant and certify as follows:

1. The representations, covenants and agreements contained herein and/or in the loan application are made to induce Mt Olympus Financial, LC to make a **business purpose loan** to the undersigned, primarily secured by certain property referred to above, with full knowledge and intent that such representations, covenants and agreements be relied upon.

2. The undersigned hereby represent and certify that the loan applied for is solely for **business purposes** and will not be used for personal, family or household purposes or for consumer credit purposes (as that term is defined by the Utah Consumer Credit Code, the Truth-in-Lending Act and the Federal Consumer Credit Protection Act and regulations promulgated thereunder).

3. The undersigned covenant and agree to indemnify and hold harmless MT OLYMPUS FINANCIAL, LC, its successors and/or assigns, for any loss, damage or penalty, including attorney's fees, which may occur if the representations contained herein are found to be false.

I have read each of the above paragraphs and understand their meaning and importance. I also understand that I am free to have this transaction and all its documents reviewed by my own attorney before signing.

Borrower 11/10/97
Date

Borrower Date